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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-789

DONALD R. McGEE,

Petitioner,

-vs-

BURLINGTON NORTHERN INC.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR RESPONDENT IN OPPOSITION

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December 17, 1975

THUNDER'S HELENA

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OPINION BELOW

The opinion of the Supreme Court of Montana (App. A of Petition) is reported at 540 P.2d 298.

JURISDICTION

This Court lacks jurisdiction to entertain Petitioner's Petition because the opinion of the Supreme Court of the State of Montana (App. A of Petition) which Petitioner seeks to have this Court review by way of

writ of certiorari is not a final judgment under the provisions of 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the opinion of the Montana Supreme Court (App. A to Petition) which vacates and sets aside the judgment of the state district court and orders a new trial, is a final judgment under the provisions of 28 U.S.C. §1257(3) for the purpose of invoking the jurisdiction of this Court to grant a petition for a writ of certiorari.

STATUTE INVOLVED

The pertinent portion of 28 U.S.C. §1257(3) reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, . . . where any title, right, privilege, or immunity is . . . claimed under the Constitution, . . . of, . . . the United States."

STATEMENT OF THE CASE

This litigation involves an action filed by Petitioner McGee against Respondent Burlington Northern Inc. Under the provisions of the Federal Employers' Liability Act, 45 U.S.C. §§51 et seq.

Petitioner McGee filed a motion for partial summary judgment in the state district court (App. A to Brief in Opposition). The state district court granted

Petitioner's motion for partial summary judgment (App. B to Brief in Opposition).

The order of the state district court was not an appealable order.

Respondent sought relief in the Supreme Court of Montana by way of a special proceeding known as supervisory control.

The Supreme Court of Montana, in an intermediate order which was entered on January 21, 1974, ordered that the relief sought by Respondent be denied and that the proceeding for supervisory control be dismissed (App. C to Petition).

The cause then was tried to a jury and resulted in a verdict for Petitioner upon which judgment was entered.

Respondent appealed to the Supreme Court of Montana. The decision of the Montana Supreme Court, *McGee v. Burlington Northern* (1975), 540 P.2d 298 (App. A to Petition) ordered a new trial.

ARGUMENT

The decision which Petitioner seeks this Court to review by way of certiorari under 28 U.S.C. §1257(3), is an opinion of the Montana Supreme Court which was entered on August 18, 1975. *McGee v. Burlington Northern*, (1975) 540 P.2d 298 (App. A to Petition).

The Montana Supreme Court held that Respondent Burlington Northern Inc. must be granted a new trial

on the basis of errors in law that occurred prior to and at the district court trial consisting principally of the exclusion of offered evidence relating to Respondent's partial affirmative defense of contributory negligence under 45 U.S.C. §53.

Petitioner's argument is based on the false premise that the intermediate order of the Montana Supreme Court of January 21, 1973 (App. C to Petition) was a final judgment within the purview of 28 U.S.C. §1257(3). The order merely denied Respondent's application for supervisory control and held, impliedly at least, that Respondent had an adequate remedy at law, i.e. appeal.

Neither the intermediate order of the Montana Supreme Court (App. C. to Petition), in which it declined to exercise its right of supervisory control over the state district court, nor the opinion of the Montana Supreme Court (App. A to Petition) following the appeal, is an effective determination of the litigation as required in order to invoke jurisdiction of this Court by way of certiorari under 28 U.S.C. §1257(3).

An annotation on this general subject is found at 29 L.Ed.2d 872. Section 5 of the annotation beginning on Page 883, cites several decisions of this court to the effect that a judgment or decree of a highest court of a state reversing an inferior court and specifically remanding a case to the lower court for a new trial

is not a final judgment and is hence not reviewable by this court. Cases cited which illustrate this rule are: *Houston v. Moore*, (1818) U.S., 3 Wheat. 433, 4 L.Ed. 428; *Tracy v. Holcombe*, (1860), U.S., 24 How. 426, 16 L.Ed. 742; *Parcels v. Johnson*, (1874), U.S., 20 Wall. 653, 22 L.Ed. 410; *Johnson v. Keith* (1886), 117 U.S. 199, 29 L.Ed. 888, 6 S.Ct. 669; *Chicago, Milwaukee & St. Paul R. Co. v. Bolch*, (1916) 242 U.S. 616, 61 L.Ed. 529, 37 S.Ct. 211; *Urie v. Thompson*, (1949) 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018, 11 A.L.R.2d 252.

In *Gospel Army v. City of Los Angeles*, 331 U.S. 543, 91 L.Ed. 1662, 67 S.Ct. 1428 (1947) this Court said:

> "Under §237 of the Judicial Code, 28 USCA §344, 8 FCA title 28, §344, only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' Department of Banking v. Pink, 317 U.S. 264, 267, 62 L.Ed. 123, 38 S.Ct. 7. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

In *Southern Pacific Co. v. Gileo et al.*, (1956) 351 U.S. 493, 100 L.Ed. 1357, 76 S.Ct. 952, five separate Federal Employers' Liability Act cases were considered by this Court. With respect to two of the claims involved in *Gileo* the California Supreme Court had re-

versed decisions of lower courts and remanded the cases for trial. This Court held that since the effect of the California Supreme Court's unqualified reversal was to remand the two cases to the trial court for trial, there was no final judgment in the highest court of the state and that therefore this Court lacked jurisdiction to review those two claims under 28 U.S.C. §1257.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Petitioner's Petition for a Writ of Certiorari should be denied.

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